UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, New York, N.Y.

v. 18 Cr. 224 (AJN)

ALI SADR HASHEMI NEJAD,

Defendant.

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November 25, 2019
3:30 p.m.

Before:

HON. ALISON J. NATHAN,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
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Southern District of New York
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(Case called)

THE COURT: I will take appearances of counsel, starting with the government.

MR. KROUSE: Good afternoon, your Honor. Michael Krouse, Stephanie Lake, Jane Kim and Garrett Lynch for the United States.

THE COURT: Good afternoon to the three of you.

For the defendant?

MR. HEBERLIG: Good afternoon, your Honor. Brian Heberlig, Bruce Bishop, my client Ali Sadr and Nicholas Silverman here for the defense. Mr. Weingarten had a medical procedure and was not able to be here today.

THE COURT: Good afternoon, counsel. And good afternoon Mr. Sadr. Please, be seated.

We are here for oral argument on the suppression motion which I broke off from the other motions to dismiss the indictment that was argued a few weeks ago. I will tell you I am close to finalizing the opinion for those so that will be out soon this week or next, so you will have that and I will get resolution to this one when I can, but I did want to hear argument on the defendant's motion. I think we should do 30 minutes per side.

Mr. Heberlig, would you like to reserve time?

MR. HEBERLIG: I would, your Honor. 10 minutes.

THE COURT: 10 minutes.

MR. HEBERLIG: And I don't have a watch, they collected it, so if you cut me off or deliver me a two-minute notice?

THE COURT: We will try to give you a two-minute notice so that will be 18 minutes from when you start.

MR. HEBERLIG: Terrific.

May it please the Court, if I can, I would like to start, we have two issues, a Franks issue, an overbreadth lack of particularity issue, in addition to the motion for return of seized property. I would like to start with the overbreadth and lack of particularity issue, if that's okay with the Court.

THE COURT: That's fine.

MR. HEBERLIG: The search warrants we are talking about here, Judge, were grossly overbroad and they lacked any particularity whatsoever. They functioned as general warrants. They were treated by the government like general warrants. The facial deficiency of the warrants combined with the way the government executed them renders the good faith exception inapplicable in this case. We think suppression is the only outcome justified by the facts here.

So, let's start with the face of the warrant because we have to start there. There were no express terms of incorporation, the government does not argue that point so we are left with just the warrant. The warrant, I have to say, is inartfully drafted, to say the least, but the way it reads

there is an introductory paragraph or series of paragraphs that talk about the probable cause that's been established that essentially says there is probable cause to believe that the e-mail accounts contain evidence of, and then there are three enumerated New York State crimes, money laundering offering a false instrument for filing and falsifying business records.

THE COURT: Isn't the inclusion of knows specific crimes what distinguishes the case from most, if not all of the cases you rely on?

MR. HEBERLIG: I don't think so for two reasons. Number one, that's not the way the warrant reads. The government would like you to interpret the warrant as if the later paragraph that says and instructs the officers what they're commanded to seize, they want that to be read as if it three enumerated offenses. That's not what the paragraph says. The officers are demanded, and it is the paragraph about that the begins, you are therefore commanded to seize literally the entirety of the account with no limitation whatsoever. This is document, it is docket 96-1, the bottom right-hand Bates Number is 488, and it's the "you are therefore commanded" paragraph. The only plausible way to read that is there is no limitation whatsoever that the government agents had on what they could seize but even if, for sake of argument, the inclusion of those three offenses could be read to limit the seizure to only documents that support those three offenses, that's no

limitation at all in the context of this warrant. We cited, it's in our reply brief, page 5, footnote 5, 10 or so cases that involve very broad categories --

THE COURT: Which reply was this? The briefing got so --

MR. HEBERLIG: Supplemental reply. The last reply we filed.

THE COURT: Okay.

MR. HEBERLIG: There is a series of cases in which Courts have held that simply including a broad criminal statute but then also having general categories of evidence to be seized that are not tied with any particularity to the statute is not enough. That's no particularization. From the Second Circuit it is the *Buck* decision and the *Rosa* decision. From the District Court it is the *Zemlyansky* decision and we also cited a series of out of Second Circuit opinions that are dead on -- *Maxwell*, *Roche*, and *Leary*, where they did say that this probable cause to believe this has been violated, like in wire fraud or in the case of *Leary*, more on point, violation of the Arms Export Control Act but, the warrants went on to then allow the officers to seize broad categories of documents that were not tied back in any respect to the statute that was cited. And in this case that's, at best, what this warrant allows. It articulates the three crimes that are at issue but then says you may seize every single e-mail, draft e-mail, and other bit

of information about these accounts. There is no categorization whatsoever that even attempts to tie what the officers can seize to the showing of probable cause in affidavit.

THE COURT: And do those cases, you said it was your supplemental reply page 5 footnote 5?

MR. HEBERLIG: Both page 5 and footnote 5.

THE COURT: And footnote 5. Were those limited to specific e-mail accounts as opposed to all devices, all electronics, and the like?

MR. HEBERLIG: I think arguably some of those cases were more specific than here. They at least had categorizations of the types of documents that could be seized like financial records, business records, tax --

THE COURT: Is no the beginning of that answer?

MR. HEBERLIG: I lost the question.

THE COURT: The question was are those -- so this case is tied to specific e-mail accounts, as opposed to what we sometimes see which is the collection of all electronic devices.

MR. HEBERLIG: Well, but I think that's, I would respectfully submit --

THE COURT: Make the argument you want to distinguish it but first question --

MR. HEBERLIG: Yes. Sure.

These warrants were limited to only e-mail accounts. They were sent to the providers like Gmail, Hotmail, not to a particular business or anything.

THE COURT: That's different than the cases you have relied on -- and then you will tell me why it doesn't matter -- but is it different.

MR. HEBERLIG: You know, I'm not entirely certain whether there are any of those cases. I think they're broader, they're businesses plus computers and e-mail whereas these are just e-mail accounts. I think warrants directed at e-mail accounts are, in many senses broader, because an e-mail account is the equivalent of someone's home office, for instance.

THE COURT: Well, devices usually contain at least one e-mail account if not multiple e-mail accounts.

MR. HEBERLIG: That is true, but what I am saying is those cases had at least limits in what categories could be grabbed. They didn't allow the seizure of the entire e-mail account, every single e-mail on the phone. They were limited to things like business records or bank records or other things, whereas our warrant is literally every single e-mail with no restriction whatsoever.

THE COURT: And then those cases also didn't include, on the face of the warrant, specification of relationship to enumerated crimes.

MR. HEBERLIG: They included enumerated crimes but

they did not tie what was being searched for and seized to those crimes, just like we have here. There was no factual information in the warrants that says, for instance in our case, money laundering. What were the officers supposed to be looking for? What type of money laundering? What business at issue? What underlying criminal activity were the agents directed to seize? There was nothing in the warrant that gave them any direction whatsoever. Likewise, with respect to falsifying business records, what business had allegedly false records? Were they cabined in any way to were we talking about Stratus? Clarity? Some of Mr. Sadr's businesses? Were we talking about banks Citibank? UBS? No factual information whatsoever in the warrants, they do seize everything, and that's what gave no direction to the executing officers.

Those cases, I submit if the Court goes and reads them, made clear that it's not enough just to articulate a crime in the warrant. You have to tie, with specificity, what you are searching for to the enumerated crime. That comes from the *Ulbricht* -- the Dread Pirate decision -- and others. And that's what's missing here. We recognize that there were three statutes cited in the warrant. That is the only way in which these warrants were different than some of the cases like *Wey* and others but that's not a meaningful distinction here. Courts, and I would point to the *Vilar* case which was analyzed in *Zemlyansky*. They say there are two ways in which you could

have a lack of particularity; one can be when there is no crime articulated, that's the way, *650 Fifth Avenue* is another case, but the second way is where there are catch-all seizures of records of some time where that catch-all is not tied with any specificity to the crimes articulated.

So, the government would like you to conclude that by saying in the warrants that there was a probable cause to believe money laundering had occurred, that that gave the officers sufficient direction but that is literally the only direction that was given so they were instructed look at the entirety of his e-mail account and look for all evidence of money laundering. That's what the cases that I am referring to in our reply say is not enough that gives no particularization or direction whatsoever to the officers.

So, on its face, our argument is the warrant is facially overbroad and operates as a general warrant. I think that there is no right answer to that. I do believe when you look at those cases, simply articulating the statutes is not enough so we are in a situation where, objectively, the face of the warrant is overbroad and that gets us to what is the appropriate remedy and in this case where you have such a facially deficient warrant I think the authorities say fairly clearly that the good faith exception is not applicable. It is certainly not our burden to show and it is the government's burden but the principal analysis that the Court has to go

through is was this warrant facially reasonable or was it facially overbroad and there is literally no direction if you read this warrant. What is an executing officer supposed to seize? It's every e-mail in the account with no discretion whatsoever.

If that weren't enough, if there was some doubt about the facial overbreadth and lack of particularity, we have the information that's now been disclosed in the government's supplemental briefing about the manner in which the search was executed and there are all sorts of problems with the manner in which the search was executed. There, frankly, wasn't a true responsiveness review ever conducted by the government. They simply put all of the million plus, 2 million plus -- depending on what number is in a different brief -- into one big pool, they call it the provider data, and there was never any attempt to separate that data into two piles; responsive and non-responsive. It was all mixed together. And a roving team of constantly changing dozen or so district attorney's office personnel went in using a program that was not designed to review documents, there was no tagging capability, it was no different than Outlook. And they went in and sort of periodically reviewed, with no overall set of search terms, no directions as to who is looking at what year, what sort of information in the e-mail, and when they would come across something they found interesting they would print it to pdf and

apparently file it away in an electronic folder all the way never ruling out any documents as unresponsive.

This process went on for, at a minimum, three years. They say that the search for responsive documents concluded as of April 2017 --

THE COURT: That's the process that produced the 420, so-called, pertinent documents?

MR. HEBERLIG: Well, it's the 420 plus the other 1,775 -- they're the May set and the September set, May 2018 September 2019 they say they were all identified as pertinent in this review. They have voluntarily decided they're not going to rely on the September set but, as we understand it, the September set is the pertinent set and the May set is some subset of that, that the district attorney's office determined may have been a hot document set.

The point of it, though, is it took three years, at a minimum, for them to do this review and then when they represented a month before the supplemental briefing that as of April -- well, they said early 2017 no one from DANY, the U.S. Attorney's office, or the FBI, has reviewed the e-mail, raw returns to identify any responsive material. That turned out not to have been true as they indicated in their supplemental opposition. There are actually three major ways in which, after April of 2017, which is already three years after the execution of the warrant but after that point in time in fact

government agents were seizing documents from the full returns right up until the close of discovery post-indictment and there are three categories in which they did that and this is from their brief. Number one, this is explained in their opposition at page 8. After April 2017, when supposedly the responsiveness review ended, the District Attorney's office directed its reviewers to go to the raw returns, to the provider data, and locate documents that they had seen before but apparently not seized. So, these at least are ones that reviewers had apparently remembered seeing during the responsiveness review but hadn't collected at the time and they went back after April of 2017, all the way until the time of indictment, and collected those documents. That's one category.

Number two, this is also explained on page 8 of their brief. They were -- the reviewers were instructed by more experienced law enforcement personnel to query new topics -- they say that's their words -- query new topics that were related to responsive documents they had seized earlier. Under any interpretation of what they're saying these were new searches and they seized entirely new documents and this, again, is after April 2017, right up until the time of indictment. And we know from just limited metadata we have seen -- frankly, the metadata is a complete mess and we have no real reason to believe it is reliable -- but what we have seen,

they're seizing documents in the week and two weeks before indictment. There are a good 20, 25 documents that directly relate to the forfeiture allegations in the indictment and they seem to have been frantically searching right up until the time of indictment so that's now a full four years after these warrants were executed.

The final category occurred post-indictment and this is explained at page 9 of their brief. Post-indictment, they apparently went to find complete documents, they say. The most charitable interpretation of what went on at this point in time was that they had seized the document earlier in time that was missing a page and they decided they had to go back and find the complete document. Well, we looked closely at what they might be talking about. The 420 documents are 420 pdfs but each pdf often has more than one document in it. It may have four or five e-mails. And what appears to have happened, and again we don't know for sure because their metadata is unreliable and the government has refused to answer our questions about what happened, but it appears that back in the day closer in time to the execution of the warrants, they seized one e-mail and later in time, even after indictment, they realized in reading that e-mail that -- you know how the e-mails read, the top e-mail is the most recent and you go back in time, say, the third e-mail down in the chain had some attachments. Well, the attachments obviously wouldn't be part

of the top e-mail, that's how e-mails work; if you respond to an e-mail the attachments are gone, they went back and they looked for the attachments, or in some instances we believe the e-mail chain stopped at an interesting point in time, they instructed the agents, *go find what happened. How did that conversation end? What else occurred in that discussion?* And we think it's beyond doubt that they seized wholly new documents post-indictment. From a statistical perspective they say that 852 additional pages were obtained post-indictment. That's more than one quarter of those pertinent documents. There is no way in the world that can be attributed to sloppy, inadvertent, missing pages.

We think, with a full opportunity to explore this issue, we are going to be able to prove, without a doubt, that these were entirely new documents being seized right up until two weeks before the close of discovery. The metadata we have seen suggests that their last discovery production was on May 15, 2018, two weeks before Judge Carter said discovery had to end, and they're still searching the full returns in the week or two weeks leading up to that production to find new documents that were produced in discovery.

THE COURT: Do you have -- maybe this is for the government -- but an exemplar document where this is the page that was originally marked as pertinent, put in that file of the 420, and now here is where the government is calling the

complete document?

MR. HEBERLIG: I can very easily come up with one.

We didn't file one, there is nothing currently in the record. I have some Bates numbers but they won't mean anything because they're not in the record but this afternoon, tomorrow, we can easily file a handful of very clear examples and explain what we think is going on, but again, we don't know because we have asked for when all the documents were seized and we have been rebuffed in those requests.

THE COURT: But the representation is, as an example, one of the original 420 marked as pertinent is like a single page of an e-mail chain and now it violates -- two minutes remaining -- now in the post-indictment phase the government went, and to complete that document, 15 pages of other communications and attachments have been added and the government indicates that that's just sort of, to be thought of as the original of the original 420 marked pertinent.

MR. HEBERLIG: Yes. That's absolutely what happened.

And, this is not simple authentication. If you think about it in terms of paper documents, three or four years after the fact the government has seized the document in paper from a house and they realize all of a sudden, oh my goodness, we missed the attachment or the relevant communication that must have been in the relevant file. They couldn't go under the guise of the original warrant back to the house, bust down the

door, and grab what they missed.

There is no practical difference there and that's exactly what they did.

I have limited time. If the Court is willing to extend my time I would like to address Franks. The one thing I didn't address about this issue, though I want to in 30 seconds because they don't defend it at all in their brief, is it is undisputed that in May of 2018, three months or two months after indictment during the bond proceedings, the government went back to the raw returns and they searched willy-nilly, didn't limit themselves to things that had been marked previously as responsive -- they searched for evidence of travel to Iran and beyond. They searched for entire categories of document like citizenship, certain bank records, assets, communications with his father. Absolutely no justification for doing that. It reveals, without a doubt, that these were general warrants and they believed they had free opportunity to go back to the well time and time again, and they did.

THE COURT: Thank you.

MR. HEBERLIG: Can I take a few minutes or can we add 10 minutes?

THE COURT: You have more time you have reserved. Why don't you take five more minutes of your time and then we will see how it goes.

MR. HEBERLIG: Very quickly then Franks.

We understand there is a high hurdle to meet in a Franks motion. We think we have met it here. There are obviously two ways a Franks argument can be sustained -- showing of intentional misrepresentations in an affidavit and reckless misrepresentations. Without a hearing we don't think we can establish intentional misrepresentations, we will acknowledge that, with the exception of one allegation in the search warrant affidavit: The allegation that the money being transferred for this project, the construction project in Venezuela was used to fund covert projects between the government of Iran and Venezuela. That's complete -- I won't use the word I want to use -- that's nonsense. There is absolutely no basis for the allegation. When we called them out on it in their briefs they say, well, the affiant only said there is reason to believe that but yet articulated no reason to believe. This was a private business contract between a private company and Venezuela and the thrust of --

THE COURT: What would I look to, in this record for which you bear the burden, to know that that was intentional? You said that you can't show intentionality with this exception. What would I look at other than the fact that you called them out and they say reason to believe?

MR. HEBERLIG: It is such a stark, like, were it true shocking allegation that this was, you know, this commercial project was in fact used to fund covert government projects

that an affiant wouldn't make such an allegation without some reason to believe it's true, and yet when we called them out on it in the brief they don't defend, in any respect, they don't give any reason in which it was included, don't defend it at all.

THE COURT: That's just flipping the burden to them. Right?

MR. HEBERLIG: Okay. Well, you know, perhaps then you could say it is reckless. I don't think there is an explanation for it and had there been one they would have given it to you in the opposition. But even if it is reckless I think it clearly happened in -- two minutes, your Honor, and I will sit down -- that was the gist of all of the misrepresentations. You just need look no further than paragraph 5 of the affidavit. This is the first affidavit, the April 2014 affidavit, basically the entire paragraph is false and what it conveys is that Mr. Sadr and his family -- conveys falsely I should say -- are national security risks, they were aligned with if not part of the Iranian government and they were engaged in activity hostile to the United States. This took a razor thin theory of probable cause and made it into a national security issue when none of those statements were true. They don't have substantial ties to the government of Iran.

THE COURT: And what do I look at to note that -- just

take that, let's isolate that. What do I look at to know that?

MR. HEBERLIG: Well, you know, I think there is no record evidence that they are.

THE COURT: Right. But we agree that the law puts the burden on you.

MR. HEBERLIG: It puts the burden on us to make a preliminary showing.

THE COURT: All you have done is pointed to the language and said they don't have a response to what supports it. Maybe that's right. I will ask, obviously, you. But that clearly is just putting the burden on them.

MR. HEBERLIG: My view of what it takes to establish a preliminary showing is to point out falsehoods if they're not rebutted in any respect. I think that that's enough to get a preliminary showing and there is case law we cited that says you don't have to submit affidavits or declarations.

THE COURT: I am asking specifically for an affidavit or declaration other than you saying it's not true and I have no reason to disagree with you other than you saying it's not true and noting that they have provided nothing in response to that which is saying you have pointed to language, burden on them. What would I look to in this record to know that that's -- to see that you have made a showing and that it is not true?

MR. HEBERLIG: Stratus is a company, for instance,

that has a website, it is clearly a private company. There is nothing that suggests it is a government company. We have argued that but we didn't submit declarations.

I think I will reserve the rest of my time. Thank you.

THE COURT: Thank you.

MR. KROUSE: So, your Honor, just to structure this a little bit. In the government's view, there are four sequential questions for the Court. First, were the warrants facially valid, and embedded in that question is the question of whether a Franks hearing is appropriate, whether there were material misrepresentations that the defense has made out that would justify such a hearing, and whether the warrant itself was facially invalid, overbroad, and not particular enough. And the government's position on that question is that the warrants were valid, there were no material misrepresentations in the affidavit, the warrants were particular and not overbroad, and therefore that aspect of the defense motion should be denied.

Second, even if the warrants were not valid, did the government execute the warrants in good faith such that suppression would be inappropriate? And this is the good faith argument and the answer, in the government's view to this question, is clearly yes. Law enforcement's reliance on those signed warrants by the magistrate judge was not unreasonable,

there wasn't any facial invalidity that was so obvious to the law enforcement agents executing the warrants that the good faith exception should not apply. So, on that ground also, the defense motion with respect to the warrants themselves should also be denied.

Third, the defense makes arguments about the manner in which the search was executed. As to these documents, as to this argument there is sort of two arguments the defense is making. They're making argument about duration and they're conflating a lot of these arguments together but they're making argument, at base, about the duration of whether the duration was reasonable and also whether the results of the search were reasonable and it is the government's position there is no bright line rule on duration. This search was conducted over a million documents and it's now down really to 420 documents that the defense has never, in any instance, stated that any of those documents were not responsive to the warrant. And so, for those reasons, the bad aspect of the defense motion should also be denied as to the manner in which the search was executed.

And finally, even if the manner in which the search was executed was found to be unreasonable, the Court would have to determine whether suppression carries meaningful deterrence benefits that would outweigh the price to be paid by the justice system. The government is not saying that if these

e-mails are suppressed the government won't be able to go forward with its case but it would be, we haven't undertaken that analysis yet but it would be very difficult to go forward in this case so there would be a real cost to the justice system and here there is no real meaningful deterrence benefits to be gained. The reviewers did not engage in this review in a deliberately reckless or unlawful manner, they did not disregard the Fourth Amendment. In fact, the way in which the search was conducted which defense counsel raises some of those issues, those actions taken by law enforcement have been endorsed in other Court decisions. It is not clearly stated law either on the duration point or the point that defense counsel raises about going back to retained data from an e-mail account and determining whether, on the same offense, there is additional evidence to support the government's theory and that's what happened here. The reviewers in this case were not going back to the prior set in order to find evidence of an entirely different crime.

The government's theory of the crime in this case has been entirely consistent from the first affidavit in 2014 all the way through the indictment in this case and even today and up to trial. That theory is that the defendant engaged in a conspiracy to conceal the fact that dollar payments were being routed through New York banks in order to benefit an Iranian entity and Iranian people and that is the government's theory

and it has been from the beginning.

So, on all of those four points, it is the government's position that the defense motion should be denied.

If I could pick up just on the Franks point quickly because that's where the defense ended? The defendant has not adduced any evidence -- as the Court noted it is the defense's burden -- to show that there were material misstatements that the affiant knew were false at the time. The government addressed this in detail in its initial response from April but there are no misstatements, much less material misstatements, that would justify a Franks hearing here. So, that aspect of the defense motion should be denied.

As to the overbreadth and particularity arguments, looking again at the warrant which the defense highlighted, the defense would have the Court ignore the entire first page and a half of the warrant and just start at the "you are therefore commanded" section on page 2 but that --

THE COURT: So, he began with that argument but then quickly shifted to even if you accept the reference in the preliminary language that references the three enumerated crimes, the argument is that it doesn't limit the search to those enumerated crimes. Right? Not just that it -- so, accepting I think Mr. Heberlig quickly said, accepting that it references those crimes, he went on to make the further argument.

MR. KROUSE: Yes, your Honor; and drafting of the warrant is not entirely clear but I do think there are aspects of it that make it obvious that the probable cause finding by the Judge and the statement about the crimes themselves and what the evidence that's expected to be found in that e-mail address make clear that law enforcement is only authorized to search that target e-mail address for these items of data that are connected to the crimes that are enumerated and I think that's pretty obvious reading of the warrant.

So, if you look at page 1, right in that first paragraph, it says that --

THE COURT: Page 487 is the Bates.

MR. KROUSE: Yes; exactly, your Honor, 487 Bates. In that first paragraph it states a finding by the Judge that there is reasonable and probable cause to believe that certain property, evidence, and records, to wit; and the to wit there, then enumerates multiple categories of information including subscriber account information, e-mails, draft e-mails, IP addresses, things of that nature. And then at the end of that first bullet point it says which shows or tends to show the following and then links it directly in the second sub-bullet point to involvement in money laundering, offering a false instrument for filing, falsifying business records, or attempt or conspiracy to do the same.

So, in that way, the warrants -- this is on the face

of the warrant. It's saying that there is probable cause that within this e-mail address there are these categories of data that will serve as evidence of these offenses. It's saying that pretty plainly. And then it goes on to say that there is reasonable and probable cause to believe that this above described property, which is the categories of information linked to the offenses, constitutes evidence and tends to demonstrate that an offense was committed -- now I am on page 488 sort of at the top of the page -- and that a particular person participated in the commission of the offense and that the target e-mail account has been used or was possessed for purposes of being used to commit or conceal the commission of an offense.

So, all of that is in the warrant, it's plain to the law enforcement officers who were executing it that this warrant, the probable cause has been found by the judge is directly linked to these subject offenses, these three state subject offenses.

The "you are therefore commanded" paragraph that immediately follows that is directed to Microsoft. The e-mail -- this warrant is directed to the service provider and they're commanding the service provider to provide is all of the e-mail, everything contained in that account, and there is nothing unusual about that in the context of an electronic warrant. The service provider is to provide everything and

then the law enforcement officers are supposed to go through and determine what in that e-mail return actually constitutes a return consistent with the warrant. And that, even though it's not described as clearly as it could be in the paragraphs after, the second to last paragraph towards the bottom of 488 where it says, This Court hereby authorizes members of New York County District Attorney's office to seize, search, retrieve and view, and then at the end of that paragraph says: Subsequent review is deemed analysis.

Now, if this really was a warrant --

THE COURT: Sorry. Where is that language?

MR. KROUSE: On 489 at the end of the paragraph that I started reading it says, it describes notwithstanding warrant, an order is deemed executed when it is served upon the e-mail provider and subsequent review is deemed analysis.

So that's a plain statement that --

THE COURT: What does that mean?

MR. KROUSE: That it's not -- it's not that law enforcement is able to keep and retain every single thing that's given to them and use that in their case. There has to be analysis conducted and the analysis is plainly referring back to what's earlier in the warrant describing what the property that can be seized by law enforcement is. And that property is those categories of data that are linked to the subject offenses.

So that's the only logical reading of this warrant. In the government's view it is particular to the offenses charged, it is particular to the location to be served which is the e-mail account and it is particular in the sense that it links the items that can be seized to the specific offenses that are listed in the warrant. That distinguishes this warrant from nearly every case.

THE COURT: So, in particular, if you would distinguish it from *Buck*, *Rosa*, and *Zemlyansky* are the cases that Mr. Heberlig focused on today.

MR. KROUSE: Yes, your Honor. Those cases concerned searches of homes where there is large categories of information that can be seized. This is a search, a stored communication search for a particular e-mail address and probable cause has been shown that that e-mail account is being used to further a crime and so authorizes the government to seize that data and to search it for evidence of that, those enumerated offenses. The government relies on *Washington*, which is a Second Circuit decision, to distinguish the defense arguments on those other cases where the Second Circuit approved of a warrant that stated that search categories of information could be seized that showed drug trafficking and so linked what could be seized to a particular crime. And that's all that the warrant needs to do. It needs to be particular in those three ways and here this warrant is. The warrant lists

the offenses, it lists where, the location that needs to be searched, and it links the items to be seized to those particular offenses.

So, that's the government's view on the overbreadth argument that the warrant is not facially invalid. But, even if it was, the good faith exception would plainly apply here. These are very fine distinctions that the lawyers are making over what the warrant says and reading the warrant, what the most reasonable interpretation of the warrant is. Law enforcement isn't expected to receive a facial -- what appears to be a valid warrant signed by a magistrate judge based on a detailed 19-page affidavit and examine it so closely that they're able to draw out these fine distinctions. They operated on good faith that this authorized search warrant was valid and that was not so unreasonable that the good faith exception should not apply.

So, even if the Court were to find that perhaps this warrant could have been more clearly drafted, it's not a situation where it's so plainly invalid, for instance a situation where the offenses aren't even stated on the warrant. It is not that situation where Courts have found good faith doesn't apply so even if the warrant --

THE COURT: So, Mr. Heberlig has -- and I need to look at the cases, but suggested that those cases I just mentioned did involve the enumerated crimes being on the face of the

warrant and articulated that there was still insufficiency because catch-all seizures weren't tied to the articulated crimes. I presume there was a good faith analysis in those cases as well?

MR. KROUSE: Yes, your Honor. I believe so.

THE COURT: And so, how then would you distinguish that presumably ultimate conclusion that it's invalid?

MR. KROUSE: It is case by case, your Honor. The standard for good faith is that it applies unless -- unless there are a few things that don't matter here. I believe the defense is relying on the warrant was so facially deficient that reliance was unreasonable and I think in this case that's plainly not the situation.

THE COURT: Where does the absence of any temporal restriction fit into that part of the analysis?

MR. KROUSE: Your Honor, the Courts have uniformly held that a temporal restriction is not required in a warrant, especially in complex investigations where the temporal scope of the conspiracy isn't entirely clear or how long the account was being used. Here the conspiracy alleged is 2006 to 2014 so it is a fairly large scale conspiracy from the perspective of the time frame.

THE COURT: Right, but that would suggest that there is not probable cause with respect to pre-2006, right?

MR. KROUSE: Not necessarily, your Honor. That's

ultimately what the government decided to charge but at the stage in which the affidavit was drafted when the search warrants were executed, that was the investigative stage and there is nothing facially invalid about a warrant that doesn't contain a specific time frame.

So, the government -- DANY in this case, which I will call the government in this case, interchangeably, with an affiant with a 19-page affidavit describing the full scope of the scheme, how the e-mail addresses were being used in that scheme and requesting warrants to search those locations and a magistrate judge approved the warrants without a specific time frame. There is nothing invalid about that and I believe there is deference shown to the magistrate judge's determination.

THE COURT: Is that just a good faith argument? That is to say that the absence of a, in light of the magistrate's -- well, you get it. To the extent that there is something problematic in the failure to have any temporal restrictions you would make a good faith argument.

MR. KROUSE: To the extent there is, your Honor. I don't think it is settled or I think actually the law is clear that a time frame is not a per se requirement in a warrant --

THE COURT: It is not a per se requirement but does that mean that the absence of a temporal restriction can never be grounds for concluding that it's unconstitutional?

MR. KROUSE: No, your Honor. No, your Honor. I think

in totality that could be one factor that the Court could consider. I think in a case like this with where there is a long-standing conspiracy that the government is investigating that has a lot of complexity with a lot of different people and a lot of different entities operating over a long period of time, it's not unreasonable to not include a time frame.

THE COURT: I think the defendant even says in his briefing -- at one point in the barrage of briefing -- that he is not relying on the absence of temporal restriction alone as a basis but in conjunction with the other factors.

MR. KROUSE: Yes. And I think that's where the government comes out. It is possible that it could be a factor in certain cases, we don't think it is here under these facts and that, in any event, it wouldn't be so obviously facially invalid that a law enforcement officer could not rely on it in good faith and so it does then bleed into a good faith argument. But, on either ground, the government's view is that --

THE COURT: So it is not really a good faith argument that the law is uncertain as to the necessity or lack of necessity of inclusion of a temporal restriction but just that in light of what is contained in the warrant it's not facially invalid in a way that would be necessary to overcome the government's good faith.

Is that the point?

MR. KROUSE: Yes, your Honor.

So, for all of those reasons, your Honor, the defense's initial set of motions, the February motions regarding the affidavit, the Franks hearing, and the facial validity of the warrant, all of those should be denied in the government's view.

Just from a timeline perspective, your Honor, it might be helpful to take a step back and note that in February of 2019, the defense filed their motions to suppress all the e-mail evidence on the Franks basis and on the overbreadth basis. They never specifically challenged the 420. In fact --

THE COURT: Right, but so now I do have a question because I have thought of it in the briefing as the government saying it's going to only rely on this 420 and then it went back and printed out the complete pdfs. Mr. Heberlig has now painted a different picture of what that looks like, that it's not -- it's not in fact the government just relying on the same 420 documents with a few additional pages printed for completion but that now the 420 documents with 800 and some additional pages includes, presumably, e-mail chains, conversations from over the course of time and different dates, attachments to exhibits and the like and I don't -- it is hard for the Court, without specific examples, to really get my head around that but I have shifted -- and you tell me why this is wrong -- I have shifted from thinking from, well, the

government said it is going to rely on the original 420 complete pdfs to something quite different.

MR. KROUSE: And I think that's based on, perhaps, a misunderstanding of what Mr. Heberlig is saying. I mean, I will let him -- Mr. Heberlig -- I will let him explain, but the 420 documents were all produced to the defense in May 2018. Those are what we referred to as the May pertinent documents.

THE COURT: And how many pages did that include?

MR. KROUSE: That was 3,145 pages. That was the full discovery production and that's what the government is stating that it will rely on at trial.

THE COURT: So it is the May 2018 production.

MR. KROUSE: Yes, your Honor.

THE COURT: May 2018?

MR. KROUSE: The May 2018 production. So, these are the documents that the defense has had for over a year and a half. It was described to the defense as pertinent documents from the e-mail search warrants so --

THE COURT: This is after you have gone back and looked for, printed the full pdfs as you have described it in your papers? That's what you are talking about?

MR. KROUSE: That's that intervening period I believe that Mr. Heberlig is talking about from April 2017 to May 2018.

THE COURT: Well, what did DANY -- DANY identified 420 pertinent documents, correct?

MR. KROUSE: Yes, although I will put a pin in that and they found more later, but the 420 were turned over in May.

THE COURT: May of?

MR. KROUSE: Of 2018.

THE COURT: Of 2018. So that's 420 docs and it consists of 3,145 pages and you have gone back now and printed -- and you are only going to rely on those 420 documents?

MR. KROUSE: Yes, your Honor.

THE COURT: But you are going to rely on something more than 3,145 pages.

MR. KROUSE: No, your Honor. That's it.

THE COURT: Okay. So, when you did go back and print the full pdfs? Just so I know. And to make sure we are not talking about something different, that produced how many pages?

MR. KROUSE: It wasn't that we went back and printed pdfs, it is that we looked back at the binders that were provided to the U.S. Attorney's office in April of 2017 because we were endeavoring to figure out when we, as now I will say the government as the U.S. Attorney's office, received those documents from DANY and that was the page number that I believe was 2,397 which is in our a footnote in our brief.

THE COURT: So that was --

MR. KROUSE: That binder or set of binders that was

provided to the government.

THE COURT: You have to be more specific. You told me a few moments ago that you were going to equate DANY with the government.

MR. KROUSE: Yes, your Honor.

THE COURT: So, I presume when you say, so give me the time frame that you are talking about. For the DANY's original identification of what has been referred to as 420 documents, that was when?

MR. KROUSE: That was produced in May of 2018; the 420 documents of 3,145. That was provided to the defense in May 2018 and that's what the government is going to rely on at trial.

THE COURT: Okay.

MR. KROUSE: I think the confusion stems from the government's footnote on page 9 of its response brief document 155 and that's footnote no. 6, your Honor.

THE COURT: Yes.

MR. KROUSE: So, that's -- I misspoke earlier -- 3,135 pages which was produced to the defense May 2018 and that's synonymous with the 420 documents.

Now, the hard copy binders, which is just for full disclosure to the Court of the facts, the hard copy binders that were provided to the government in April 2017, when DANY brought the case to the U.S. Attorney's office, we did a page

count on that and it had 2,283 pages. And there is a way to explain --

THE COURT: Why aren't you -- why isn't it that that you are limiting yourself to?

MR. KROUSE: Your Honor, because it doesn't contain everything that DANY identified as pertinent during its review and it doesn't identify -- and it doesn't contain everything that the government disclosed to the defense as the pertinent documents that the government would be relying on at trial in May 2018.

THE COURT: So, take the first part of that. How is that the case -- just to get the language you used -- it doesn't contain everything that DANY identified as pertinent during its review?

MR. KROUSE: Yes, your Honor.

THE COURT: Explain that.

MR. KROUSE: So, DANY provided those binders to the U.S. Attorney's office as a way of saying here are some very probative pieces of evidence that you should look at in reviewing whether you want to take this case and charge it federally. It did not contain every document that DANY had identified as pertinent up to that point. So, as we detailed a little bit in our motion, DANY conducted a wide-ranging review of over a million documents and narrowed that down to these 420. The 1,775 Sadr documents that we identified for the

defense in September of 2019 and the 622 non-Sadr documents we identified --

THE COURT: None of which you are going to rely on.

MR. KROUSE: None of which we are going to rely on.

THE COURT: Sorry. I did want to get clarity on this point before I move on.

You are not going to rely on, you said at certain points in the briefing, in your case-in-chief. You are not going to rely on at all no matter what?

MR. KROUSE: Your Honor, the reason why we say case-in-chief is because the government, if the defense chooses -- because they have all of these documents, we have disclosed them to them, they now have them, they may rely on them during their case or during cross-examination of witnesses and I think at that point the government would argue that to put the government on equal footing with the defense who is now relying on these documents, there may be other documents within that same set which we are not relying on in our case-in-chief but that we may want to -- we reserve the right to bring to the Court as documents that we want to introduce in light of the defense action.

THE COURT: So it would seem for purposes of the suppression analysis I have to consider it. In other words, you are saying we are only going to rely on 420. That gets me nothing because you might use one page knowing that the defense

will use another page and then you will use something else.

MR. KROUSE: I don't think that's -- practically speaking, I don't think that's what's going to happen, your Honor.

THE COURT: You are forced to forego using them, in which case using anything other than the 420 -- and we will deal with the 852-page discrepancy -- but for shorthand we will call the 420 documents --

MR. KROUSE: Right.

THE COURT: -- either you say we are limiting ourselves to that, in which case I won't consider the matter in which the other documents were seized and produced, or you don't in which case I do. And I think for purposes --

MR. KROUSE: And I think for purposes of suppression we can say we will forego using any of the other documents.

THE COURT: Okay.

MR. KROUSE: The only caveat being the defense has those documents including the non-Sadr documents and there may be a time in which they seek to introduce it and then the government would oppose.

THE COURT: Would oppose.

MR. KROUSE: If they sought to use those. We are dealing in hypotheticals here, your Honor.

THE COURT: No. I want to know, because I have to do the analysis, whether the government is foregoing using

anything other than what we are now calling the 420 documents no matter what.

MR. KROUSE: We are foregoing using those documents. Yes, your Honor.

THE COURT: So then the question is what we mean by the 420 documents and whether it's appropriate for the 852 original additional pages to be used. I think we have narrowed the question to that.

MR. KROUSE: Yes. And on that they're not additional pages in any real sense. The 420, which are 3,135 pages, that's what was turned over to the defense and identified as responsive in May 2018 so, from the government's perspective, this footnote is informative for the Court just to show that we have -- that the government hadn't received a lot of these pages in binders from the defense as early as April 2017, but for purposes of the Court's analysis as to what should be suppressed, if anything, and nothing from the government's perspective, those 420 documents, that's the full 3,135 pages, were provided the to the defense in May 2018 and up until the point --

THE COURT: And those were all identified by DANY during the time frame that we think of as the responsiveness review as pertinent? That's the representation? Or a portion of them were identified as pertinent and then later DANY went back and included more documents within -- more pages including

additional e-mail communications in a chain, attachments to e-mail and the like. Which is that?

MR. KROUSE: I think it depends on what the Court means by the responsiveness review. So, the duration --

THE COURT: Well, you have talked to me about three years.

MR. KROUSE: So 2014 is when the first -- April 2014 is when the first warrant was executed. DANY brought the case to the U.S. Attorney's office in April 2017 previously -- and the government has explained this in its motion -- previously made representations that that was the point when all reviews stopped. Further inquiry by the government has revealed that there were additional searches conducted between April 2017 and the time of this document as well as for the bail issue.

So, there isn't -- I can say that the vast majority, and DANY has represented to the government, that all of the 420 documents were identified as responsive as early as April 2017. In any event, in May 2018 all 420 documents clearly had been identified and had been disclosed to the defense. Many of those documents have print dates on them on the bottom of the page, it will say something like the date it was printed which are in 2014, 2015, 2016, further indicia that they had been seized well in advance of the indictment and the discovery in this case. But, in May 2018 the government provided this full set of 420 documents, 3,145 pages and told the defense these

are the documents that were responsive to the warrant and that the government will rely on at trial. The defense didn't seek to suppress those 420 specifically in their initial motions in February. They made these general motions about the facial validity of the warrant in the Franks hearing but at least at that time the government and the defense were on the same page that the 420 documents was the universe out of this million documents that had been seized that would be at issue at trial.

After the briefing in May 2019, the government learned from DANY -- the U.S. Attorney's office learned from DANY for first time that there was in fact other documents that had been identified as responsive and because the government was concerned that that impacted our disclosure obligations to the defense, especially with respect to the non-Sadr documents whose discovery had been limited to the 420, the government asked DANY to get a filter team to review -- to pull together all of the documents that they had identified as responsive in these various platforms, to deduplicate them, and to tell us whether there were more. We didn't know at that time whether there in fact were more. It turned out there was 1,775 Sadr documents and 622 non-Sadr documents and we promptly, as soon as we learned of them, learned about the existence of these additional documents, mentioned it in Court, your Honor will recall, and then made a promise production to the defense of those documents. The defense then filed their motion seeking

to suppress those documents and our response is that we do not intend to rely on them at trial.

And so, we are back now to the 420 that for over a year and a half everyone in this case had understood to be the evidence seized from the search warrants and the posture in February and April was that if the defense failed in their motions to suppress all the e-mail evidence from the Franks perspective or from the overbreadth perspective, then those 420 documents would be admissible.

So, that's sort of the factual perspective.

THE COURT: That's helpful, and I want to get clarity on it.

So, your representation is none of the 3,135 pages that was turned over to the defendant in May of 2018, all of those documents, all of those pages were identified by DANY as pertinent by April 2017?

MR. KROUSE: Your Honor, that was our understanding from DANY and --

THE COURT: I am asking now.

MR. KROUSE: Yes, your Honor. And the vast majority the answer is yes. So, this is why. The government has been a little bit hamstrung by the fact that we are not able to go back and look at other -- like the file structure. If you recall at the last hearing, the defense asked the government to cease any review of any other documents or to look at anything

else so we ceased that and told DANY to stop as well. If it would be helpful to the Court if it is dispositive to the Court, the government can undertake a document-by-document analysis for those 420.

THE COURT: Page by page, just to be clear.

MR. KROUSE: Page by page.

THE COURT: And very specifically the question I am looking for an answer to is did DANY mark as pertinent every one of the 3,135 pages that were turned over to the defendant in May 2018. Did DANY mark each of those pages as pertinent by April 2017? And you believe yes but the caveat is that you have been a little bit restricted in your ability to assess that.

MR. KROUSE: Yes, your Honor. We believe yes. But I don't want to represent to the Court unless I am entirely sure, and there has been some difficulty with getting access to the file structure and as well as accessing internal e-mails within DANY.

So just on this point and then the government will take that step, there is some distinctions to be drawn between the 420 -- first, it is actually 417 because the defense asserts spousal privilege over three and the government is not fighting that so it will be down to 417.

THE COURT: Does that reduce our page number by some amount?

MR. KROUSE: That will. It will, but we will look at that. I don't believe by much.

And then there is the fact that some of those e-mails amongst the 417 were non-Sadr e-mails of which he does not have standing to suppress and that's an additional 62.

THE COURT: Docs?

MR. KROUSE: Documents.

THE COURT: Not pages.

MR. KROUSE: Not pages, documents. So, the actual documents that Sadr has standing to contest is more like 353, I believe.

THE COURT: And I am just interested if there is any delta between what remains after you have carved that out, what was turned over in May of 2018 and what was identified by DANY as pertinent by April 2017.

MR. KROUSE: Yes, your Honor. And in order to conduct that analysis with the Court's permission, we will access -- not we as in the trial team but some other personnel at DANY, will have full ability to access all the e-mail platforms and file folders in which those documents were saved, as well as the binders that those documents were contained in.

THE COURT: Okay. I think you are out of time. You are over and I will give Mr. Heberlig additional time, 10 minutes over.

Any final points, Mr. Krouse, since I kept you over?

And I will make sure you get equal time.

MR. KROUSE: Just, your Honor, that aside from the challenge to the warrants themselves which the government believes lack merit and should be denied, this search by DANY consisted of a large provider set of data, there were lots of challenges involved in identifying these documents, there was no blatant disregard of constitutional principles during the period of that review with respect to duration it was reasonable.

With respect to the amount of documents that were identified as pertinent and seized, that was also reasonable and for all of those reasons the manner in which the search was conducted was not unconstitutional, it was reasonable. There is also a good faith argument that the government asserts in its papers on that point so separate from the point about the warrant.

Suppression here, in the government's view, would not further any real deterrence interest and there would be an actual harm to the administration of justice by suppressing these documents. This was not a situation where there was blatant disregard where the agents were acting in a manner that ignored the Fourth Amendment entirely and for that reason, with respect to the execution of the warrant, there is a good faith argument that the government believes should be considered by the Court as well.

THE COURT: Thank you.

MR. KROUSE: Thank you.

THE COURT: I think that gives you 12 minutes plus what you had earlier so let's call it 17.

MR. HEBERLIG: Okay. Thank you, your Honor.

I want to just start back with the facial invalidity of the warrant because that's a critical part of the good faith analysis.

THE COURT: Actually, let me ask so I can clear it, we have narrowed what we are talking about with respect to the documents. At the very least we know the government has foresworn using anything other than what we will call the 420 documents and there is some question remaining as to what, exactly, that consists of.

MR. HEBERLIG: Yes, but I think there is a misconception of how they got to the 420. There was one responsiveness review that they have now represented seized all of these documents. The 420 was the district attorney's office culling them down to hot documents but it sounded like there is a suggestion that the 420 were seized first and they were the good seizures and then the rest of them that they are foreswearing or foregoing were seized later after April 2017. That is not the case. They were all seized as part of this roving review and in April of 2017 they culled them down into a hot documents binder. The Court can't ignore the other

documents. When you are looking at how this warrant was executed, was it reasonably executed, were the executing agents given sufficient guidance on what to seize, it is the entirety of what they deemed pertinent and, as we put in our reply brief, there is document after document that is wildly irrelevant to anything in this case.

So, I don't think it's correct to say, well, we no longer have to worry about those documents. They were part of their pertinence review. In our view they're Exhibit A for why this warrant, on its face, gave no guidance to the executing officers. They're seizing e-mails about poetry, wedding invitations, wildly irrelevant stuff. So, the fact that at some later point in time they came up with a hot docs binder doesn't mean that this was a valid search. That's a small portion of this bigger seizure.

I would also say it seems beyond dispute that the entirety of the May 2018 production was not identified as pertinent by April 2017. I mean, what else could the 852 pages be but the searches and seizures that they say were done after indictment to complete the documents?

So, unless -- I really don't know any other explanation. We will see what their explanation is but those 852 documents were seized after April 2017.

THE COURT: Pages -- but it is the case that you received the 3,145 pages indicated as what DANY indicated as

pertinent by May 2018, right?

MR. HEBERLIG: Correct. But I'm not really sure of the point of the argument. First of all, we did move to suppress the entire 420. We couldn't make arguments we weren't aware of. This stunning factual record that came out after their disclosure that there were additional pertinent documents gave us more to work with. We are not mind readers. We didn't know the grossly deficient way in which the search warrant was executed so we had a lot more to say when we learned that, but that doesn't mean we ever suggested the 420 were seized appropriately. They were seized pursuant to a facially invalid warrant and that's really the critical point here.

The Court said it in *Wey*, what is the point of the particularity analysis? It is to ensure that the warrant doesn't leave it to the unguided discretion of the executing officers. What on earth would an executing officer who was given this warrant that gives authority to seize all e-mails, I will just assume for the sake of argument now, all e-mails reflecting involvement in money laundering -- what on earth guidance does that give to the executing officer? Money laundering is an extremely broad offense, just like falsifying business records. Was this narcotics money laundering?

THE COURT: Just to be clear, so all e-mails in a particular e-mail account that the affidavit offers probable cause to suggest as being used during the commission of the

alleged crime, so again not -- every document in the house, not every document in every electronic device but tied to a specific e-mail account, tied to a specific e-mail account documents used in furtherance of or to cover up money laundering.

MR. HEBERLIG: Right, but certainly not by reference to the facts described in the affidavit because we know you are constrained to the face of this warrant. There is zero factual information.

THE COURT: Well, probable cause is in the affidavit.

MR. HEBERLIG: Understood.

THE COURT: Probable cause doesn't have to be in the warrant. The warrant is a judge saying I have found probable cause for the search of these particular documents tied to particular crimes in this particular place.

MR. HEBERLIG: Right, and the documents that the agents are directed to seize must be tied to the probable cause showing. That is square Second Circuit law, that's *Ulbricht*. How is that the case here? How is an agent supposed to come upon an e-mail and say, oh, that's evidence of money laundering? There is literally no facts, no indication of the type of identification of the companies that are involved in money laundering.

THE COURT: So, can you cite me the cases you rely on, a case which says something like direction -- I mean a

comparable case where you have got direction to search particular e-mail accounts, particular e-mail accounts for documents related to X crime and a Court has held that as unconstitutionally overbroad?

MR. HEBERLIG: *Zemlyansky* is the most directly relevant. The *Zemlyansky* warrant was a mix of paper documents and electronic documents but the clause seeking electronic documents articulated three offenses, I believe it was healthcare fraud, bank fraud, and mail fraud, and the Court said that was no limitation at all. That's the most directly on point but I think the other cases, I don't know that it -- respectfully, I think it may be a distinction without a difference where there is a broad statute cited, violation of, say, money laundering or mail fraud or wire fraud, and then the rest of the warrant says you may seize all documents which is what this warrant says. That's what all of those decisions we cite say is inappropriate. But *Zemlyansky* is one that immediately comes to mind that has that information.

The whole point of the cases like *650 Fifth Avenue*, *Groh*, all the decisions that say it has to be articulated on the face of the warrant is because we can't assume that the executing officers have read the affidavit. Here there is no record evidence that they did. I assume if they had, we would know about it, the government would have represented they did. That's why it has to be in the warrant. And respectfully --

THE COURT: The probable cause doesn't have to be in the warrant.

MR. HEBERLIG: No. Categorization of what the agents are authorized to seize based on the showing of probable cause.

So, in this instance there should have been some categorization of, okay, I find that there is probable cause to believe money laundering occurred therefore you are permitted to seize e-mails that show and then some categorization, whatever the government's theory of money laundering is. Maybe in this instance it was wire transfers showing payment routed through correspondence banks in the U.S. from one foreign bank to another. But, there is nothing here. There is nothing that would prevent an officer from seizing an e-mail related to narcotics trafficking or any other kind of money laundering and that's just, frankly, not sufficient cabining of the officer's discretion.

So, I do think, upon a close analysis of the cases we are dealing with an objectively deficient, a facially deficient warrant, and that gets us to the good faith exception is the government's principal argument here.

The good faith exception, which again it is their burden, turns principally on an objective look of the warrant. We carefully analyzed what the Court did in *Wey*, what the Court did in *Zemlyansky* about first being an objective determination and then if you get beyond that to this narrow gap of the

factors in *Rosa*, I frankly am not sure, given the more recent Second Circuit decision in *650 Fifth Avenue* where the Court in *Rosa* meant to articulate those facts as specific factors that district court judges must go through when trying to evaluate that narrow gap after you get past the objective determination. But, even assuming for the sake of the argument that that is still the valid analysis under *Rosa*, every single one of those factors cut in our favor. Okay?

The first factor is was there any exigency here? Was there a need, like in *Rosa* in the middle of the night, to execute the warrant? No. Obviously, no.

Number two, was there a single reviewer, the affiant, was the affiant also present during the execution of the search so that you could assume he was familiar with the contents of affidavit as was the case in *Rosa*? No. The affiant in our case didn't even participate in the review time.

Were the searches cabined based on the factual information in the affidavit? We have absolutely no assurance from the government that that's the case. They can't articulate a list of search terms beyond what few haphazard recollections -- they have no search history, they have presented you with no specific information that there were cabined searches.

Was there an over-seizure? That's the fourth factor. Here, obviously yes. We articulate in our reply brief

over-seizure doesn't mean how many documents were seized, it means were there irrelevant documents seized that do not relate, in any respect, to the probable cause showing and we catalogue in our reply brief the many irrelevant documents that were seized.

Beyond that, those are the *Rosa* factors that all cut in our favor. Beyond that, we also have the factors present in our case that the Court found significant in *Wey*. We have the government going back to the well, well after the responsiveness review to search and seize more documents.

So, every factor cuts in our favor here and shows the good faith exception certainly does not apply and at an absolute minimum.

THE COURT: The distinguishing point Mr. Krouse made that strikes me as distinguishing from that is there you had evolving theory of the case, new crimes being suspected, the kind of thing you would expect the agents to go and get a new warrant in order to conduct a new kind of search. That's not what we have here.

MR. HEBERLIG: I actually respectfully think that's not at all clear. From the stuff that they now say they're not going to rely upon but that was part of their pertinence review, it looks like they're searching for things like IRS, tax evasion issues, things that don't bear on the probable cause showing warrant. We don't have proof from them what the

agents searched for, search histories, very little. No declarations support their brief, no contemporaneous documents. We have conflicting representations about what they did and reviewers did. I don't think it is clear at all that they weren't roving in search of theory of prosecution and just because they're now foregoing the broader universe that this pertinent review identified, that doesn't -- that's just them trying to sort of get past the fact that the original search was problematic.

THE COURT: It is a question of whether it was the original search or going back to the well because there is always the question of what remedy, if there is a Fourth Amendment violation, and suppression of everything is not typically the remedy and if, for example, you are relying on a, going back to the well where much later after they're altering their theory of the case and looking for new things, then it would be perfectly appropriate to say I would suppress those later documents but not the original pertinent search.

MR. HEBERLIG: I think what you may be getting at is is it possible to sever, is there some severance. They haven't argued that and I don't think so based on, if we are correct that the face of the warrant is unconstitutionally overbroad then you can't seize, let's just say for the sake of argument, 10,000 documents and at a later point it is only 500 that were actually directly responsive to the probable cause showing.

That's all we are going to rely on, we will forget about the other 9,500. That's not how it works. That would encourage overbroad fishing expeditions, overbroad warrants, and essentially be no harm no foul to the government.

So, I don't see any way to sever here. I believe the facts are far from clear that this 420 document set was seized appropriately, at a minimum it was seized pursuant to this facially overbroad warrant.

So, I guess the last thing which we didn't address in the opening but I do think was --

THE COURT: Just as an example, on *Zemlyansky* I think this never came about but after Judge Oetken concluded that suppression was warranted, he said the Court will determine the appropriate scope of the suppression remedy following further submissions by the parties in a subsequent hearing. So, to the extent that you are relying on that case, I don't know that it answers the question of what an appropriate remedy would be and to the extent an appropriate remedy would be to limit the government to the original set of documents, it is relevant that they're foregoing use of those documents.

MR. HEBERLIG: But I don't think they're the original set of documents in terms of the original seizure. They're just now called our greatest hits from an overbroad seizure and I don't think they can voluntarily cleanse a bad search by saying we are both going to use the good docs, the ones that

are tied to the warrant when the factual allegations in the affidavit were not part of this warrant. The officers had no way to identify that, that's why they seize so many irrelevant and overbroad documents.

So, in our view, they can't now say, well, we will take the ones that were clearly covered by the probable cause showing. That's not how it should work.

THE COURT: Just so I understand, you reject the characterization that there was this initial pertinent review and then sometime passed and they, the ADAs or folks working for them went back and started to do additional searches.

MR. HEBERLIG: It's not that I reject it. This is what they represented in their brief. They say that the 420 were hot documents that were selected by I think Mr. Lynch, maybe someone else, from the broader pertinent set that were in these locked electronic folders that we have heard about. So, someone at the DA's office right before they transferred it over to the U.S. Attorney's office looked at everything they had seized and came up with a smaller binder of the greatest hits but sequentially it wasn't those 420 were seized first pursuant to sort of a narrowly tailored search and then thereafter they went out and seized 2,000 more get more creative with their search terms. That's not what happened. There was one responsiveness reviewed and this doesn't even account for what went on after April 2017, I think we have

already gone through that but this had to, at least a quarter of it was seized as a result of these later searches post-indictment or leading up to --

THE COURT: That's not the representation currently of the government, although the government has caveated that they're going to make the final determination but we don't, as we sit here, know that that's the case.

MR. HEBERLIG: I know you have asked the government. I would re-submit to you the three, four five good examples that we think show that conclusively.

THE COURT: I appreciate that.

MR. HEBERLIG: The last thing I want to say, I may be getting close to my time.

THE COURT: Two minutes, but you want to go to the facial validity? Or maybe you have done that.

MR. HEBERLIG: I have already done that.

What I didn't address the first time around but I think is highlighted by this discussion the Court had with Mr. Krouse about, well, could you use some of these documents depending on what the defense does, do I really need to rule upon them. This sort of goes to our motion for return of seized property. Their argument is you don't need to decide that, we get to hang on to that, we need to authenticate the documents. In our view, no matter what happens on our ultimate motion, unless there is full suppression, it probably moots the

whole thing but we are entitled to return of the non-responsive documents. We know from their factual showing that they are spread throughout the DA's office, the U.S. Attorney's office, at least four different document platforms, a filter team -- actually, two filter teams, public network folders, the electronic folders. They're all over the government. They have conceded they have no reason to use those documents anymore, they won't use them anymore, they should be returned to us and purged from the government's system.

The only argument they've made as to why that should not occur is authentication. That the government needs to have a full set for authentication. Frankly, I don't think that issue is present here like it was in *Ganias* where the Court was talking about a hard drive and very different set of data because you need the hard drive because of the way documents are stored on the hard drives. But, even assuming authentication is a legitimate issue, these days there are thumb drives, 2-terabyte thumb drives, all of this provider data could be put on one thumb drive, given to the Court, put it in your desk drawer. If there are any authentication issues, the government can use that material to their heart's content. What we don't believe is appropriate is that the raw returns that they have admitted various government agents went back to time and time and time again including during the bond proceedings to come up with documents that they used to try to

lock him up, that should not be allowed to continue. There is no basis for it to continue and it is a simple matter for this material to be purged from all government systems. Authentication is a non-issue.

THE COURT: And so I understand that point, return of the non-responsive material. To the extent authentication presents as an issue, the non-responsive material could be revisited for dealing with that?

MR. HEBERLIG: Correct, by --

THE COURT: You submitted a proposed order for alternative relief originally, a long time ago now.

MR. HEBERLIG: I think the alternative was an order barring them from accessing it, frankly, based on the --

THE COURT: Is sounds like a version of that which you are suggesting which is it is turned over, but to the extent there are authentication issues, access can be revisited.

MR. HEBERLIG: We don't literally need it back because we have a copy of it.

THE COURT: You need it gone from them.

MR. HEBERLIG: We need it gone from them. We need agents within the bowels of the government unable to search the raw returns at any point in time during the trial. There is no basis to do so.

THE COURT: Unless there is an authentication issue.

MR. HEBERLIG: Unless there is an authentication issue

and that can be easily softened by one of two ways.

THE COURT: Stip.

MR. HEBERLIG: We can stip and that may well happen, that's what we often do during trials, but the Court can hang on to the raw returns or you could order that we hang on to the raw returns. We already have them. What clearly doesn't need to happen, these dozen or so government agents continue to hang on to them.

And if I could ask for indulgence for one more minute?

THE COURT: Yes, but Mr. Krouse, do you agree to that?

MR. KROUSE: Your Honor, just on this point, the review that the Court and the government has agreed to do and Court has directed us to do is to look at the 420 documents and identify when each page was identified as responsive. The only way we are able to reconstruct that is because we retained those documents and the final structure and that stuff. So, I think this issue is not ripe for decision because the government does need, and I mentioned this, an opportunity to go through the e-mail returns which would -- the e-mails, excuse me, internal e-mails within DANY that contain some of that data, the file structure which contains some of that data. Because what I understand the defense to be saying is that the government should purge from its systems -- and by government here I am saying the U.S. Attorney's office and DANY -- purge from its systems everything that the defendant -- that relates

to the defendant's e-mail accounts except for the 358 documents that belong to the defendant and we can't do that right now because we need to address this issue for the Court.

THE COURT: How long will it take to address this issue?

MR. KROUSE: Would the week of December 9th be acceptable, your Honor? Which I think is not next week but the following week.

THE COURT: Right. So two weeks with the understanding -- and I will get your response, Mr. Heberlig -- with the understanding that the government is looking at and a taint team or whatever it is that is going to do this is looking at the nonresponsive -- to the extent you need to look at the non-responsive material it is only to make this assessment of the question that I have asked.

MR. KROUSE: Yes, your Honor.

THE COURT: Once that's done then would you consent to return, for lack of a better word, of the non-responsive documents with the available caveat that if there is an authentication, which I think is the only argument you have offered?

MR. KROUSE: That's the only argument; yes, your Honor.

THE COURT: If that emerges then it can be revisited.

MR. KROUSE: Yes, your Honor.

THE COURT: Mr. Heberlig, is that acceptable?

MR. HEBERLIG: You know, we are frustrated because they identified this problem in May of 2019.

THE COURT: Mr. Heberlig, here we are.

MR. HEBERLIG: Here we are. So, two weeks I guess it is. What can we say.

The last point I guess I wanted to address --

THE COURT: So what I just said is agreed to. That will resolve the motion for return of property issue on consent and, again, with the caveat that if an authentication issue does arise, it can be revisited that the government may be able to have access to non-responsive material for purposes of authentication but only from you or from the Court.

MR. HEBERLIG: I believe that's correct. You would effectively be granting the motion, correct.

THE COURT: Yes.

MR. HEBERLIG: I think there is a difference between denying a motion as moot and granting a motion and we briefed that issue. I don't need to get into it but there should be some teeth, not just sort of okay, government, we accept that you won't do this. We have established a basis for return, they say they don't object to it, you should grant the motion.

THE COURT: If you will draft maybe a version of the alternative order which includes the specific caveat for authentication and how maybe the practical way in which you

would like to accomplish it, propose it to the government and submit that to me -- I don't think that you need to wait until December 9th, you could do that now. So, a week from now? Is that a Happy Thanksgiving?

MR. HEBERLIG: How about the Wednesday after Thanksgiving.

THE COURT: Okay.

MR. HEBERLIG: And my last just one minute here, I do want to respond to, there was an argument made about the face of the warrant.

THE COURT: Yes.

MR. HEBERLIG: Beyond the last paragraph, I think it was the paragraph that carries over from 488 to 489 and I think the suggestion was the discussion of subsequent review as deemed analysis was an indication that the Court contemplated that there would be a connection back to the enumerated offenses. I would say that is not at all clear that that's what that means. If you go back to the first part of that paragraph, the "further, this Court hereby authorizes," it authorizes members of the DA's office to seize all of the data provided to them by the e-mail service provider. So, I still think we have the better of the arguments that the government is asking for you to interpret the warrant as saying they're only permitted to seize e-mails that reflect the enumerated offenses but that's not what the plain language of the warrant

says. Right here in this paragraph alone the DA's office is authorized to seize all data and images provided to them by the e-mail service provider which is everything, is the entire contents of the warrant and I think that last clause is just to satisfy -- I think there is a 10-day requirement that the warrant has to be executed within 10 days under New York Law and it is indicating that the warrant and order is deemed executed when it is searched upon the e-mail provider. That's all that means. Subsequent review isn't the execution of the warrant for purposes of that 10-day requirement.

So, I do think the better reading of the warrant on the face of it is that it was a general warrant authorizing the seizure of everything.

THE COURT: And that would be by excluding consideration of the earlier language.

MR. HEBERLIG: I think if you read the plain language the earlier paragraphs say there is probable cause to believe that there was a violation of those three statutes and that e-mails may be found in the account reflecting that fact. And you go down, go on to the subsequent paragraphs and say therefore -- if they don't say therefore you are authorized to seize e-mails showing money laundering and those offenses you are authorized to receive e-mails and every bit of information about that account, and they are asking you to interpret as reference back to the earlier language but that is not what it

says. And, again, we have already articulated the reasons why, even if it did incorporate that earlier language that that's not enough, that is no particularization at all.

THE COURT: Thank you.

MR. HEBERLIG: Thank you.

MR. KROUSE: Your Honor, if I may have a moment to address a couple of small points?

THE COURT: Small points. And then, Mr. Heberlig, you will have final opportunity, and then at some point we go home.

MR. KROUSE: Yes, your Honor.

So, just on the point that Mr. Heberlig raised about what else could be in the eight-hundred-and-some-odd pages. The government isn't representing that the binders that contain those two thousand some pages constitute the entirety of the 420 documents or the entirety of what DANY seized. DANY had several different types of binders that contained evidence sort of on a thematic and on a defendant basis so there were payments binders, there were binders directed toward certain defendants, binders of e-mails linking the defendant to Iran and to Iranian companies and so from those binders DANY created this hot docs binder and gave it to the U.S. Attorney's office. So, the page difference may be explained by multiple other documents that were in other binders that were seized prior to April 2017 by DANY but just weren't in those binders that were given to the U.S. Attorney's office in April 2017 which is why

the government is agreeing with the Court's request to go back and go page by page. But, on this point of what else could there be, there is many different explanations for what it could be and this exercise, I think, will clarify things quite a bit.

THE COURT: Could you respond to the point that it is inappropriate to, for the Court to fail to consider all the other documents simply because you have narrowed -- so, to the extent that they're irrelevant as to the arguments as to overbreadth of the search, even though you have now -- I mean, any overbroad search could then be narrowed to hot documents and that can't be that that excuses the overbreadth, or at least put it this way, shouldn't be considered in thinking about the manner of the execution of the search.

MR. KROUSE: Just on that point, the government doesn't necessarily disagree that the other documents that were identified as responsive may have some relevance to the Court's determination on whether the search was actually overbroad but on that point, we are not talking about hundreds of thousands of documents that were identified as material or as responsive by DANY. In addition to the 420 we are talking about 1,175 from the defendant's own account.

THE COURT: And 620.

MR. KROUSE: And 620, too, from the non-Sadr accounts and Mr. Heberlig characterizes this as some hugely overbroad

search that has identified all of these irrelevant documents yet in their motion they cite seven documents out of that many, almost 3,000 documents that they object to and there are explanations for why those receive documents would be responsive to the warrant. For instance, wedding invitations and thank you notes; these can go to the identity of the person who is using the account. The fact that an invitation to Sadr's mother is found in his account is relevant to showing that that account belongs to Sadr. The e-mails, spam e-mails from companies wishing Sadr holiday greetings, small things, but the broader point is first there are possible explanations for why those would be identified as responsive but, more importantly, that's seven e-mails or seven categories of e-mails from a search that yielded nearly 3,000 documents.

So, to characterize DANY's search as grossly deficient or identifying all of these non-responsive documents I think is overstating it quite a bit. And, as to the 420, the defense has never identified a single document from the 420 that they view as non-responsive to the warrant which I think further evidences the fact that this was a targeted search conducted by DANY, a review that took a long time with a lot of documents for a complex scheme and out of that large provider set DANY did find the most pertinent and inculpatory e-mails.

Other than that, your Honor, one point, just one clarification to make, is that Mr. Heberlig seems to conflate

incorporation of the of affidavit for purposes of determining whether the warrant was facially deficient and the relevance of the affidavit for guiding law enforcement in determining what documents are responsive to the warrant. All that is required in the warrant itself is particularization as to the crimes committed, the place to be searched, and linking the documents to be seized to those crimes. The affidavit is still relevant and the detail contained in the affidavit is still relevant in guiding officers. It is not that law enforcement can only be guided by what's on the face of the warrant. That's not the analysis. The analysis is is the warrant facially deficient. The government's position is no for all the reasons we went through and, moreover, you can look to the affidavit in how the government agents would have been able to execute the warrant consistent with what the magistrate judge found and here there is a detailed 19-page affidavit supporting probable cause, there is a warrant where the judge found probable cause as to three offenses and detailed the items of property that were being responsive to the warrant with respect to those offenses and so there is no facial deficiency.

THE COURT: How would you distinguish *Zemlyansky* where there was specific relevance to crimes on the face of the warrant?

MR. KROUSE: There were references to specific enumerated crimes but I believe Judge Oetken found that the

warrant itself didn't link the property to be seized to those enumerated offenses. And here, that's not the case. Here it's directly linked that within this one e-mail account the government is authorized to seize categories of data that would be expected to be found in an e-mail account that are linked to those three offenses.

THE COURT: Categories of data on the face of the warrant?

MR. KROUSE: Categories; so subscriber information, draft e-mails, sent e-mails, things of that nature. And the government again, Zemlyansky is a case going back to *Washington* which is a Second Circuit case in *Washington* the warrant said any and all papers records, receipts, documentation, telephone lists and records which may be related to illicit drug activities and found that that was sufficient particularity. This warrant is more, much more particular than that and lists the offenses that are being investigated and how the data contained in the e-mail account may be expected to support evidence of those crimes.

THE COURT: Okay.

MR. KROUSE: Finally, Judge, just on the severance point, the government has effectively self-severed the 1,775 and 622 by agreeing not to proceed with them. If the government is able to and the government expects the 420 documents which the defense has had since May 2018 and has been

on notice that those were the items marked as responsive in the search warrant, the government believes that those 420 should not be suppressed for all the reasons that we have stated.

THE COURT: Thank you.

MR. KROUSE: Thank you.

THE COURT: Mr. Heberlig, I will give you two minutes, if you need it.

MR. HEBERLIG: Just very briefly.

We did not, in the limited time, if the Court remembers we had about 48 hours to come up with our reply brief. We did not attempt to catalogue every irrelevant document that is in the search returns. I can hand up two of the most. Obviously they're e-mails involving Mr. Sadr's mother and a friend and they have no substance to them and they reflect another individual out in the snow. Nothing of substance. I would be happy to hand them up. These are not isolated examples.

THE COURT: Those are within the seven that you included in the briefing?

MR. HEBERLIG: I don't think so. I don't remember if they're in the seven or not. There are way more than seven that -- we highlighted the seven most egregious in the briefing but there are far more irrelevant documents and it stands to reason there would be fewer irrelevant document in their greatest hits collection but that's not the relevant analysis.

They don't get, after executing a warrant unconstitutionally in a defective manner, to say we screwed up on three quarters of them but this one quarter was really good. It doesn't work that way.

The last thing I will say, they rely on the *Washington* case as articulated, at least that warrant says documents which may be related to narcotics activity. That's not in our warrant. It says seize all e-mails. They're asking you to imply that what the Court meant was e-mails related to money laundering and, frankly, I would submit there is a dramatic difference between narcotics-related documents that are very specific and documents that relate to falsifying business records or money laundering. The types of offenses that are much more akin to mail fraud or general fraud statutes that case after case we cited say can't be -- the warrant can't be sufficiently specific by saying all records related to --

THE COURT: Just on the first point, again, I get that you say at the command language but you have also said, even if you take into account it does say which tends to show the following: The categories of things and involvement in money laundering, false instrument filing, or falsifying business records. So, it does tie it, each of those, and means that each of the things in the top bullet points are tied to the enumerated crimes.

MR. HEBERLIG: Well, that's the probable cause

showing. That's the judge saying I find the probable cause to be X but then he goes on to say here is what you are authorized to receive.

THE COURT: You want me to ignore that for purposes of what the warrant --

MR. HEBERLIG: I am looking at the plain language of the warrant: You are therefore commanded to seize and it articulates what.

THE COURT: Therefore you want me to ignore the earlier language which does tie the enumerated categories of items to the enumerated crimes.

MR. HEBERLIG: I think we may be saying different things. I think the earlier part of the warrant is what are the crimes for which probable cause has been established but that's not the same as --

THE COURT: And you want me to ignore that when I look at the later language which commands seizure of all documents.

MR. HEBERLIG: I want you to focus on the plain language of what the officers were authorized to seize and it is not cabined.

THE COURT: So I can take into account the earlier language.

MR. HEBERLIG: They're just apples and oranges in my view but even if you do read it --

THE COURT: If I am counting how much fruit there is I

would count both, right, apples and oranges. So, the question is I'm not comparing them. I'm asking from you, is your argument that I can consider it but it creates too much confusion? Or that I can't consider it because of the distinction between the two parts?

MR. HEBERLIG: My argument is the more natural reading is that's not what the warrant authorizes seizure of but even if you do interpret it that way, there is not sufficient linkage under what the Second Circuit says needs to be in a warrant. There has to be an articulated link between what the officers are authorized to seize and the probable cause showing and there is none here. They're authorized to seize all e-mails and they're given no guidance as to an e-mail reflecting money laundering or falsifying business records or filing a false instrument.

THE COURT: No guidance; if I don't consider that they're guided in part by what the warrant on its face says there is probable cause to search.

MR. HEBERLIG: What I am saying is on its face there is not sufficient guidance. Even if you read it the way you read it. You can't look at it to have the --

THE COURT: I am not --

MR. HEBERLIG: *650 Fifth Avenue*, *Groh*, and frankly *Wey* say if it is not in the warrant, the affidavit doesn't cure the deficiency.

THE COURT: That's not true. What *Wey* says is if the enumerated crimes are not there and there is not language specifically incorporating it, you can't look to the affidavit and so on its face on those terms you can look to the affidavit if there is language incorporated, if that language itself is incorporated into the warrant or some subset of it you can look to that.

MR. HEBERLIG: Look to the affidavit.

THE COURT: Look to the language included in the earlier portion of the warrant.

MR. HEBERLIG: So, I suppose where we are left is the direction given to the executing officers is you are authorized to seize all e-mails showing involvement in money laundering, offering a false instrument for filing or falsifying business records. Was that constitutionally specific enough guidance to the officers? Respectfully, under the cases, we have submitted it is not even close.

THE COURT: You do look to the affidavit, right, just for clarity? Not on the question of facial validity of the warrant but on the question of if I think under good faith it's facially valid, there is the question of manner of execution.

MR. HEBERLIG: That's not what the Court just said in *650 Fifth Avenue*. The government made that argument. They said that reviewers were well familiar with the case and the Court said that is irrelevant and clearly erroneous. You have

to look at the face of the warrant. It's direct out of *650 Fifth Avenue*.

THE COURT: Okay. Thank you.

MR. HEBERLIG: Thank you very much.

THE COURT: The motion -- well, I guess it is motions are submitted. I will research and put out a written order. We have a time frame -- we have two time frames, it is approximately two weeks for the government to answer the Court's question and we have a week and a half for the defendant to put in renewed proposed order on the return of property in light of what we have discussed and, Mr. Heberlig, you are welcome to put in, within the, shall we say a week and a half time frame, the exemplar documents that go to the additional pages of the 420 documents?

MR. HEBERLIG: If we could have the two weeks I think that would be better. Our expert on the documents is on some extended foreign travel.

THE COURT: So two weeks for that as well.

MR. HEBERLIG: Yes.

THE COURT: All right. We are adjourned.

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